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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956

No. ~~849~~ 93

HENRY T. McKINNEY,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY and the BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Respondents.

BRIEF

In Opposition to Writ of Certiorari of Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

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BRIEF

In Opposition to Writ of Certiorari of Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

This respondent, Brotherhood of Railway Clerks, etc., prays that writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on December 22, 1956.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 240 F. 2d 8 and is set out verbatim in the Petition.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether under Section 9 of the Universal Military Training and Service Act of 1951 petitioner, upon his return from military service, was entitled to promotion to a new position which he **might** have achieved had he remained in the continuous employment of the carrier but to which he has no fixed, certain, established or contractual right.

STATUTE INVOLVED.

The Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459, and particularly Sec. 9 thereof.

STATEMENT OF THE CASE.

Any inaccuracies on the part of Petitioner in his summary of the Complaint below, which was dismissed, need not be dwelt upon here because the Complaint (R. 2, 3, 4, 5) is before the Court. Because of the substantial significance in this cause of certain provisions of the collectively bargained agreement here involved between Respondent carrier and Intervenor labor organization, we set out herein certain provisions thereof in Appendix A, pp. 9 to 12, infra.

ARGUMENT; REASONS FOR DENYING THE WRIT.

There is no basis whatever for the granting of a writ of certiorari or the interferring with the sound result achieved by both the District Court and the Court of Appeals below.

1. Arguments Advanced by Petitioner.

The Courts below did no more than correctly apply the established rule that the Universal Military Training Act assures the veteran's right to re-employment on the seniority escalator as to such position as he would have had as a matter of fixed right had he remained continuously in his civilian employment thus averting the veteran's "losing ground", being penalized or suffering in seniority status because of his military training. With equal force the cases hold that U. M. T. does not catapult the veteran into such conjectural or speculative promotions as he might or might not have achieved based upon his being considered fit and able to fill a job which chanced to open.

The contract here involved clearly prescribes that plaintiff had and has no right to the position, seniority and pay claimed. Rule one (1) divides clerks into several groups and Rule one (1) (3) (A) expressly provides that promotions are confined to an intra-group basis save that Group two (2) employees, based on fitness and ability, will be given preference over non-employes in the assignment to Group one (1) positions. Rule four (4) establishes that an employee's seniority in any branch or class commences when pay starts and under Rule five (5) the exclusive determination of fitness and ability is vested in the appointing officer. Hence, the contract pleaded and relied upon by plaintiff gives him no absolute, fixed or certain right, predicated upon seniority alone, to promotion to Group one (1), but rather extends to him only a limited prefer-

ence to Group one (1) promotion, carefully restricted to a fitness and ability basis. The conjectural possibility that plaintiff might have been promoted to Group one (1) had he not been in the military service, is not enough to entitle him to relief under the Act relied upon.

Our position is unqualifiedly upheld by the guiding principles stated in **Fishgold v. Sullivan Drydock and Repair Corporation,** 328 U. S. 275; **Meehan v. National Supply Company,** 160 F. 2d 346 (C. A. 10, 1947); **Oil Workers v. Sinclair Refining Company,** 171 F. 2d 192 (C. A. 5, 1948); **Raulins v. Memphis Union Station Company,** 168 F. 2d 466 (C. A. 6, 1948); **Hewitt v. System Federation,** 161 F. 2d 545 (C. A. 5, 1947).

Petitioner here seeks to establish a principle far beyond the range of the law or reason, i. e., that the returning veteran is entitled under U. M. T. to such job as he probably would have attained had he not gone into military service even though he had no right to same. The cases cited by petitioner do not spell out that extra-legal result. **Oakley v. Louisville & N. R. Co.,** 338 U. S. 278, 94 L. Ed. 87 (1949), at most holds that the expiration of the one year statutory period did not terminate the veteran's reemployment or other rights under the act. **Diehl v. Lehigh Valley Railroad Co.,** 348 U. S. 960, 99 L. Ed. 749 (1955), a memorandum opinion, indicates that a union contract executed after a veteran's return from service could not, by requiring certain periods of temporary service as a qualification for promotion defeat the veteran's rights under the Selective Service Act. **Morris v. Chesapeake and Ohio Railway Company,** 171 F. 2d 579 (C. A. 7, 1949), held merely that the qualified veteran was excused from "bidding in", during the service period, a job to which his seniority clearly entitled him, and that he could do so upon his return from service. Other cases relied upon by Petitioner are equally unrelated to the fallacious proposition asserted by him.

We urge that this Court disregard petitioner's improper reference to 150 alleged pending cases involving the application of the "escalator principle". Not only is this reference beyond the record but there is no scintilla of indication that the ruling in this cause has any bearing whatever on those vaguely referred to cases.

The unique and unusual circumstances required to warrant the issuance of a writ of certiorari simply do not exist here. The Court of Appeals adhered to principles established by this Court following the language and spirit of the statute as it has been interpreted by the Courts. Unless the Universal Military Training and Service Act is to be converted into a massive guessing game as to how far a veteran might have gone save for his service, the writ must be denied and the sound result achieved below must be permitted to stand.

2. Further Considerations Which Bar the Relief Sought by Plaintiff.

Were the petitioner not barred from proceeding herein for the reasons assigned by the Court of Appeals, the petition should have been dismissed and accordingly a writ of certiorari should be denied because of the following valid and compelling factors.

A. The District Court lacked jurisdiction over this action because exclusive jurisdiction over the Parties and the subject matter is vested in the National Railroad Adjustment Board by the Railway Labor Act (C. 691, 48 Stat. 1185), 45 U. S. C., Ch. 8, Secs. 151-188, no part of which was repealed by the Universal Military Training and Service Act. Inherent in the demand of the Complaint is the requirement that the District Court **interpret** the agreement and adjudicate Petitioner's grievance. The Railway Labor Act vests exclusive jurisdiction to deter-

mine precisely those issues in the National Railroad Adjustment Board. A series of authoritative decisions of the Supreme Court and other appellate courts have firmly established that the Board's exclusive jurisdiction cannot be encroached upon by the Courts and that its processes are, in effect, a continuation of the contract negotiations and administration. It has uniformly been held that the matters within the province of the Board's jurisdiction cannot be determined by the Courts even though there is some jurisdictional base which, but for the Railway Labor Act, would warrant the assumption of jurisdiction by the Courts.

This Court in **Slocum v. D. L. & W. R. R. Co.**, 339 U. S. 239, 94 L. Ed. 795 (1950), stated:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

Again, in **O. R. C. v. Pitney**, 326 U. S. 561, 90 L. Ed. 318 (1945), this Court said:

> "Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave minimum responsibility to the Courts."

The Universal Military Training and Service Act neither expressly or impliedly repealed nor carved out an exception to the Railway Labor Act and when the issue has been considered by the Courts it has been held that, where applicable, Railway Labor Act procedures are a condition precedent or a bar to action under U. M. T., **Willoughby v. A. T. & S. F. Railway Company**, 14 Labor Cases, No. 64,464 (1948, D. C. Kan.). Hopeless confusion and obliteration of the salutary purposes of the Railway Labor Act

would flow from the sustaining of plaintiff's position. It is fundamental that repeal of statutes by implication is not favored in law and will not be upheld unless the repugnance or inconsistency is so clear and plain as to be beyond the range of reconciliation. **Arthur v. Homer**, 96 U. S. 137, 24 L. Ed. 811 (1877). Furthermore a general act (U. M. T.) does not repeal a specific or particular act, (Railway Labor Act) unless same is done expressly. **Ex parte Kan-gi-shun-ca**, 109 U. S. 556, 27 L. Ed. 1030, 35 S. Ct. 396 (1883).

B. Petitioner, under no circumstances, would be entitled to relief because his complaint on its face shows that he failed to exhaust or even invoke the administrative and grievance procedures of Rule 27, Rule 31, et seq. of the collectively bargained agreement. This is a prerequisite to action at law. **T. W. A. v. Koppal**, 345 U. S. 653, 97 L. Ed. 1325, 73 S. Ct. 906 (1953). Petitioner cannot pick and choose between the provisions of the contract, tenaciously relying on some but disregarding those which do not appeal to him.

C. Petitioner by waiver and laches, as disclosed on the face of the complaint, further establish that the complaint was providently dismissed. Although an abstract allegation of unexplained "protest" is made, he alleges that he took no other steps to assert his rights, he went to work on the assigned basis, filed no suit, failed to invoke the contractual grievance procedures and thus for one full year, led Respondents to believe that he acquiesced and concurred in his assignment and seniority date. Veterans' rights under U. M. T. may be waived, **Hastings v. Reynolds Metal Co.**, 165 F. (2d) 483 (C. A. 7, 1947); **Walsh v. Chicago Bridge and Iron Co.**, 90 F. Supp. 322 (D. C. Ill., 1950), and same patently was done here.

Hence, for those supplemental reasons, the writ must also be denied.

CONCLUSION.

For the reasons stated, we submit that the Petition for a Writ of Certiorari should be denied and it is that action which we respectfully urge on this Court.

SAM ELSON,
CARROLL J. DONOHUE,
HUSCH, EPPENBERGER, DONOHUE, ELSON & JONES,
Attorneys for Intervenor-Respondent, Brotherhood of Railway Clerks, etc.

APPENDIX "A."

SIGNIFICANT EXCERPTS FROM COLLECTIVELY BARGAINED AGREEMENT HERE INVOLVED.

* * * * * * * *

Employes Affected—Rule 1.

(1) Clerks, Sub-Foremen, Assistant Foremen, Sub-Storekeepers, City Ticket Agents (Traffic Department).

Qualifications—Clerks—Employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, dictating letters, vouchers, bills, statements, reports and similar work, including employes who examine or verify such work, also typists, comptometer operators and calculating machine operators, shall be designated as clerks.

(2) Other office and station employes, such as office boys, messengers, helpers, train announcers, gatemen, baggage and parcel room employes, train and engine crew callers, operators of office or station equipment devices, telephone switchboard operators, elevator operators, ticket and way-bill assorters, machine operators, employes operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers.

(3) Station, platform, warehouse, transfer, dock store room, stock room and team track freight or material handlers or truckers, and others similarly employed; car sealers, scalers, fruit and perishable inspectors, stowers, stevedores, breakout, loaders, locators, coopers and other similarly employed; and laborers employed in and around stations, offices, storehouses and warehouses.

(A) Rules of this agreement as herein written will apply to employes in group two (2). Promotion will be confined

to the group herein named, with the exception that employes on positions enumerated in group two (2) will be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability after the provisions of rule six (6) of this agreement have been complied with, in relation to employes embraced in group one (1).

* * * * * * *

(C) Seniority of employes will be restricted to the respective group in which employed, except that seniority accumulated in groups two (2) or three (3) will be recognized in reduction of forces in the event employes holding seniority in group two (2) or three (3) positions, are laid off account of reduction in forces, such employes will be privileged to exercise their seniority in groups from which promoted.

* * * * * * *

Seniority.

Seniority Datum—Rule 4.—Seniority begins at the time the employe's pay starts in the respective branch or class of service and on the seniority district on which employed, transferred or promoted, and when employes are assigned to positions as provided for in Rule 10 of the agreement, or other rules which presuppose regular employment.

* * * * * * *

Bulletin—Rule 10.—New positions or vacancies will be promptly bulletined in places accessible to all employes affected for a period of five (5) days in the seniority district where they occur. Bulletin to show location, title, hours of service and rate of pay. Employes desiring such positions will file their application with the designated official within that time, the name of the successful applicant will be posted for a period of five (5) days where the position was bulletined and a copy furnished to interested chairmen. This rule does not apply to employes in group three (3) of Rule 1.

Under this rule positions should be bulletined for bid not later than three (3) days after position has been vacated by regularly assigned employe.

Physical assignment to positions which have been bulletined for bid will be made not later than three (3) days after the expiration of the time limit under this rule, except where longer period is required extension will be made by agreement between the carrier and local or division chairmen, representatives of employes.

* * * * * * *

Bidding After Absence—Rule 15.—An employe returning after leave of absence may return to former position or may, upon return or within three (3) days thereafter, exercise seniority rights to any position bulletined during such absence. Employes displaced by his return may exercise their seniority in the same manner.

* * * * * * *

Positions Abolished—Rule 23.—Employes whose positions are abolished may exercise their seniority rights over junior employes, and other employes affected may exercise their seniority in the same manner, subject to the provisions of Rules five (5) and eighteen (18).

Employes who exercise seniority account of reduction in force or positions abolished within seven (7) days from such date notify the supervising officer of their desire to exercise their seniority on a position occupied by a junior employe. The supervising officer will within three (3) days either accept or reject the application of the employe desiring to exercise seniority.

Employes whose application to exercise seniority has been rejected will within three (3) days designate his second choice, and his application will be considered in accordance with the provisions of these rules.

Employes whose applications to exercise seniority have been rejected may appeal in accordance with Rule 31 of the agreement.

An employe whose application to exercise seniority has been rejected and who designates a second choice does not lose the right to appeal as provided for in Rule 31.

Any employe whose position has been abolished, or who is displaced as a result of force reduction, desiring leave of absence, will, prior to being granted a leave and within seven days after abolishment or displacement, designate in writing the position upon which he desires to place himself. The employing official will, upon such notification, notify the employe affected. The employe affected may, if he so desires, exercise seniority in accordance with prevailing rules, or he may retain the position held by him during the time that the employe granted the leave is absent from the position. Upon return of employe granted the leave the employe displaced may exercise seniority.

In the event the employe granted the leave fails to return at expiration of same, the employe holding the position will be considered as having never been displaced.

* * * * * * *